BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE GUADALUPE MONTOYA Claimant VS. **MALIBU ROOFING & SIDING** Respondent AND **UNKNOWN** Insurance Carrier AND/OR **WORKERS' COMPENSATION FUND**	)	Docket No. **261,620**

ORDER

Claimant requests review of a preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on May 9, 2001.

ISSUES

The Administrative Law Judge denied compensation because the claimant suffered an idiopathic fall.

The sole issue raised by the claimant is whether the Administrative Law Judge erred in determining the claimant's accidental injury was not compensable.

Respondent contends the evidence demonstrates the cause of claimant's injury was due to an idiopathic fall and therefore the claim is not compensable.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On November 18, 2000, claimant was working on a roof. He testified that when he stood up to get another roll of paper he felt dizzy, slipped and fell off the roof. The claimant doesn't remember falling off the roof.

The claimant sustained a fractured femur of his right leg. On November 19, 2000, Jeffrey T. MacMillan, M.D., performed surgery placing an intramedullary rod with proximal and distal cross locking screws in claimant's right femur. On March 28, 2001, Dr. MacMillan performed an additional surgery and removed the distal cross locking screws. Dr. MacMillan's office note of April 10, 2001, indicated claimant was improving and was scheduled for a follow-up appointment in four weeks.

The Workers Compensation Fund contends that claimant did not slip and fall off the roof, instead, he fainted and fell from the roof. The Fund contends the claim is not compensable because the cause of the injury was fainting which was idiopathic or a personal condition.

The Division of Workers Compensation Application for Hearing form (E-1) requires the claimant to state specifically the exact cause and source of the accident. The application filed by the claimant contains the response, "Felt weak, fainted and fell off the roof."

On claimant's cross-examination, he testified through an interpreter that the information on the Application for Hearing was correct. Claimant's evidentiary deposition was taken on January 22, 2001, wherein the following colloquy occurred:

> Q. Okay. The application for hearing which you signed indicates that you were feeling weak and that you fainted and fell off the roof; is that correct?
>
> A. Yes.
>
> Q. Did you fall to the ground when you fainted?
>
> A. Yes
>
> Q. Did you lose consciousness when you fainted?
>
> A. Yes.
>
> Q. Did you regain consciousness before you hit the ground?
>
> A. No.[1]

[1]Deposition of Jose Guadalupe Montoya, January 22, 2001, pp.13-14

The Fund notes that this testimony does not indicate claimant slipped and fell from the roof but rather he stood up, fainted and fell from the roof.

As previously noted, at preliminary hearing the claimant testified through an interpreter that he felt dizzy, slipped and then fell from the roof. The claimant testified:

> Q. In your testimony that you provided on January 22 you were asked if you fainted. So I need to know something, did you faint, actually faint, or did you just get dizzy and slip?
>
> A. I felt dizzy because as I stood up rapidly I felt dizzy, but when I felt dizzy, I didn't put my foot down correctly and I slipped and then after that I don't know what happened.
>
> Q. And then you lost consciousness, is that it, you don't remember anything else that happened?
>
> A. No.[2]

The preponderance of the evidence supports the Administrative Law Judge's finding that claimant sustained an idiopathic fall when he rapidly stood up, became dizzy and fainted. The Board finds a nexus between claimant's feeling dizzy and his fainting spell. Rather than being an unexplained fall, this would be a personal condition of the employee. *See* 1 Larson's Workers' Compensation Law § 9.01[2] (1999).

In *Bennett v. Wichita Fence Co.*, 16 Kan. App.2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992), the claimant suffered from a personal condition which the Court described as idiopathic, which caused him to experience epileptic seizures and blackouts. While driving a company vehicle, claimant experienced a seizure and, after blacking out, hit a tree. The Kansas Court of Appeals found claimant's condition, while idiopathic, to be compensable. The Court explained that, where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. (Citation omitted.) But where an injury results from the concurrence of some preexisting personal condition *and* some hazard of employment, compensation is generally allowed. (Citation omitted.)

Professor Larson agrees that the effects of a fall can become compensable if conditions of employment place the employee in a position to increase the effects of the fall, such as in a moving vehicle. 1 Larson's Workers' Compensation Law § 9.01[1] (1999).

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[2]Transcript of Proceedings, May 8, 2001, page 7.

In *Bennett*, the claimant's personal epileptic condition caused him to black out. But it was the fact that he was driving the employer's vehicle that subjected him to an additional risk. Moreover, in *Bennett*, the Court cites a Colorado case where the fact that the employee was working on scaffolding above the ground provided sufficient increased or additional risk where a personal condition caused a fall.

The fact that claimant was working on a roof placed him in a position to increase the effects of the fall and meet the concurrence standard of *Bennett*. Accordingly, the Board concludes that claimant has met his burden of proof to establish that he sustained an accidental injury arising out of and in the course of his employment.

At the preliminary hearing, the Fund noted that it had no objection to authorization of Dr. MacMillan in the event the claim is compensable. It is therefore the Board's determination that Dr. MacMillan is authorized to provide continued treatment to the claimant for the work-related injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated May 9, 2001, is reversed and remanded for further proceedings and/or orders on claimant's request for temporary total disability benefits and payment of medical expenses.

IT IS SO ORDERED.

Dated this _____ day of July 2001.

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BOARD MEMBER

pc: C. Albert Herdoiza, Attorney, Kansas City, Kansas
J. Paul Maurin III, Attorney, Kansas City, Kansas
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Workers Compensation Director